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NO. 87-427

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1987

RUSSELL C. EARHART, SR.,
Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

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QUESTIONS PRESENTED

I. WHETHER THE PENNSYLVANIA SUPERIOR COURT PROPERLY AFFIRMED THE TRIAL COURT'S DENIAL OF PETITIONER'S MOTION TO SUPPRESS EVIDENCE BASED ON AVERMENTS IN THE AFFIDAVIT OF PROBABLE CAUSE USED TO OBTAIN THE SEARCH WARRANT?

II. WHETHER THE PENNSYLVANIA SUPERIOR COURT PROPERLY AFFIRMED THE TRIAL COURT'S EVIDENTIARY RULING ALLOWING EVIDENCE OF APPELLANT'S QUESTIONABLE TAX COLLECTION PRACTICES OTHER THAN THE OFFENSES CHARGED, UNDER WELL-ESTABLISHED EXCEPTIONS TO THE GENERAL EXCLUSION OF EVIDENCE OF OTHER CRIMES?

STATEMENT OF THE CASE

In August 1983, the Commissioners of Dauphin County, Pennsylvania, employed Main Hurdman, a firm of certified public accountants, to audit the tax collection accounts of Petitioner, Russell C. Earhart, Sr., the duly elected tax collector for Londonderry Township in Dauphin County. The county commissioners directed Main Hurdman to check for a pattern of late remittance or nonpayment of taxes by Petitioner.

The auditors sent letters to the taxpayers in Londonderry Township asking if, as of August 31, 1983, their taxes were paid. If taxes were paid, the taxpayer was asked to provide proof and date of payment. The auditors prepared a statistical analysis comparing the payment date with the remittance date by Petitioner. The audit revealed discrepancies between the Dauphin County records and the information the

taxpayers directly provided. For example, the Dauphin County Treasurer's records indicated that payments made by some taxpayers in March or April 1983, were not received from Petitioner until August. Other taxpayers paid taxes in June or July, which were not received at all by the county.

The auditors then advised the county commissioners that, in order to fully investigate the matter, it was necessary to look at school taxes, as well as county collections. Petitioner was collecting county real estate taxes, as well as Lower Dauphin School District real estate and personal taxes.

The school tax audit was similar to that for the county taxes. For every taxpayer listed as having unpaid taxes as of October 28, 1983, a letter was sent requesting confirmation that the taxes were not paid. If the taxes were paid, the

taxpayer was asked to furnish proof of that payment. The auditors prepared a list of taxpayers for whom the Lower Dauphin School District did not receive taxes but who furnished the auditors with proof that they had paid the taxes to Petitioner. This list revealed that Petitioner collected and failed to timely remit taxes totalling $166,349.50. This list was appended to the criminal information filed against Petitioner and became part of the charging document.

At trial, the Commonwealth offered into evidence copies of either the canceled checks or the receipted tax bills for the people on the list. The parties stipulated to the authenticity of these documents and to Petitioner's receipt of the payments represented by these documents. The list covered Lower Dauphin School District taxes, school real estate taxes and school personal taxes. Although a few of the bills dated from 1981, the vast majority were from 1983.

Testimony from the supervisor of tax and census for Lower Dauphin School District revealed that the tax notice advises the taxpayer that bills paid during July and August are subject to a 2% discount. During September and October, the face amount of the tax bill is due. If the bill is not paid until the end of October, a 10% penalty is assessed. Thereafter, the taxpayer has until April 15, in the case of real estate taxes, and until December 31, in the case of personal taxes, to make remittance to the tax collector. Notably, the tax collector is required by law to remit tax receipts to the school district within three working days of receipt.

The payment process for county real estate taxes includes similar staggered payment provisions, with four instead of three payment periods. The tax collector is required by law to turn over receipts to the

county treasurer by the tenth of the month following that of collection. 72 P.S. §5511.25

When Main Hurdman began the audit in September 1983, the tax supervisor provided a computer printout of unpaid personal taxes and a copy of the tax duplicate showing unpaid real estate taxes. Main Hurdman's audit revealed a large number of discrepancies, specifically taxpayers who provided proof of payment to Petitioner, but whose payments were not recorded in the school district records.

The tax supervisor confirmed that tax payments evidenced by the tax bills in the information were never received by the Lower Dauphin School District from Petitioner. Tax reconciliation sheets for the 1983-84 period appeared to indicate that all the anticipated tax revenues which had been billed were received. However, $145,000.00 was received

from Statesman Insurance Company, the bonding agent for Petitioner. An additional $15,000.00 was received after the tax supervisor left his employment with the school district. The review process continued from September of 1983 until trial. During that time, the total was adjusted to $166,349.50.

The director of the Dauphin County Tax Claim Bureau explained that her office received delinquent county real estate taxes as of January 1 and by the first Monday in May with respect to delinquent school taxes. Taxpayers were notified of the delinquency, both as regards to county real estate and school taxes, on July 31 following the year of billing. On occasion, taxpayers who were notified of a delinquency appeared in the tax office with proof of payment to Petitioner. In such cases, Petitioner paid the taxes, including interest and penalty. This

occurred quite often with respect to the 1982-1983 period and, although there are forty tax collectors in the county, this type of thing did not occur with the other thirty-nine.

The Commonwealth produced the bank statements for the Petitioner's tax collector account at Hamilton Bank. On January 31, 1983, the balance was $1,811.58; on February 28, 1983, the account had a deficit balance of $4,231.09; for March 31, 1983, there was a balance of $1,322.79; on April 29, 1983, the balance was $13,550.90; May 31, 1983, the balance was $1,689.28; on June 30, 1983, the balance was $3,399.70; July 29, 1983, the balance was $21,698.99; as of August 31, 1983, the balance was $85,351.24.

In September of 1983, Petitioner made a single payment on the account of collected Dauphin County realty taxes in the amount of $71,199.47. The receipted tax bills which

Petitioner provided with the payment showed that the bulk of the taxes were collected during February and March of that year.

The Dauphin County Controller stated that when Petitioner came to the court house with the September payment, Petitioner admitted sometimes sending a check to an insurance company from his tax collector's account. When Petitioner discovered the "mistake", he would write a check from his insurance account to the tax collector's account. The Controller also noted that the September remittance to the county was subsequent to the initiation of the Main Hurdman audit.

Petitioner testified that since 1973, along with being tax collector, he also operated an insurance and real estate business. He maintained multiple business and personal bank accounts. Petitioner was questioned about these accounts and the timing of his deposits into them.

Petitioner was questioned concerning the check for $71,199.47 which he delivered to the county controller after the audit began in September 1983. He stated that the receipted tax bills which were delivered to the controller along with the check indicated the date on which the monies were received in the tax office. He repeated his earlier testimony that the payments represented by the $71,000.00 had simply been in his office and not deposited until September.

Petitioner was confronted with a number of canceled checks corresponding to tax bills which were included in the bundle delivered to the county in September. In check after check, Petitioner was constrained to admit that the checks were endorsed by him, deposited into his Hamilton account, and cleared the taxpayer's account during February and March of 1983. Petitioner was then confronted with the balances in his

Hamilton account, the tax collector account, as reflected on the bank statements for the months ending January 31 through August 30, 1983. On March 31, the account balance was $1,322.79; on April 29, the balance was $13,550.00; and on May 31, $1,689.00. Petitioner again insisted that the checks which he had received in February and March to cover the $71,000.00 paid to the county in September were in his office until deposited in his bank in September.

Petitioner was reminded of his testimony concerning a loan which he testified had gone for remodeling his properties and for "no other purpose". He was then shown an $8,000.00 deposit made into his tax collector account on May 28, 1982. He was also shown a copy of a check made payable to him from a relative as a loan dated May 24, 1982, for $8,000.00. Petitioner was forced to admit that he had

deposited this $8,000.00 loan into his tax collector's account. He admitted that the money was never removed from the tax collector's account in order to cover remodeling expenses.

Petitioner was then questioned further about his account at Fulton Bank. He again stated that no tax monies went into the Fulton account and that no tax monies would have been paid from that account. He was then shown a check dated May 2, 1982, in the amount of $4,950.00 drawn by him on his Fulton Bank account and deposited into his tax collector account at Hamilton Bank. He was also shown a check drawn on Fulton Bank in the amount of $2,050.00, dated May 20, also deposited into the Hamilton tax collector's account.

PROCEDURAL HISTORY

On May 23, 1984, Chief County Detective for Dauphin County, Kenneth J. F. Barbush, filed a complaint against Petitioner, charging him with Theft by Failure to Make Required Disposition of Funds Received. The complaint, as originally filed, charged that Petitioner, as the duly elected tax collector for Londonderry Township, failed to remit $162,273.53 to the Lower Dauphin School District. The amount represented school taxes collected by Petitioner during the time of August 20, 1981, through October 31, 1983. The charge was comprised of 506 counts representing that number of separate tax bills which, although paid by the tax payer, had not been remitted by Petitioner.

At the preliminary hearing on May 30, 1984, the information was amended to add an additional count, i.e., 507 counts, which increased the amount due to $162,563.87.

At formal arraignment on July 5, 1984, Petitioner pleaded not guilty and requested a jury trial, which was set for September 19, 1984. Petitioner requested and was granted five continuances prior to the commencement of trial on February 14, 1985. Prior to trial, the Commonwealth moved to amend the information to consolidate the number of previous counts to 435, and to amend the total amount of theft to $166,349.50.

Prior to trial, the Petitioner filed a Motion to Suppress Evidence seized as the result of a search warrant served at his place of business on October 7, 1983. The motion alleged, inter alia, that the affidavit failed to set forth probable cause for the search. Following a hearing held immediately before trial, the Court denied Petitioner's motion for suppression.

Trial commenced on February 14, 1985. On February 21, 1985, the jury returned a

verdict of guilty on all 435 counts. Post-trial motions were filed and denied. On April 18, 1986, Petitioner was sentenced to a term of imprisonment of not less than three and one-half (3½) nor more than seven (7) years.

The Superior Court of Pennsylvania affirmed the judgment of sentence on December 22, 1986. On July 15, 1987, the Supreme Court of Pennsylvania denied the Petitioner's Petition for Allowance of Appeal.

SUMMARY OF ARGUMENT

The affiant for the search warrant properly presented an audit by an accounting firm as the probable cause to support the issuance of the warrant to search the office of Petitioner, who was the subject of a tax collection investigation. Averments set forth in an application for a warrant may include hearsay, as long as the affiant swears to the veracity of the information. Notably, the Petitioner does not challenge the veracity of the hearsay information used in the probable cause affidavit.

Evidence of Petitioner's practices involving collection of county real estate taxes was necessary to prove his illegal practices regarding collection of school district taxes, which formed the basis of the offenses charged. Petitioner, who collected real estate and school district taxes, engaged in a complex tax siphoning scheme.

Exclusion of evidence regarding the real estate taxes would have made it impossible for the Commonwealth to set the factual predicate for the case. At no point were the uncharged practices concerning real estate collections identified to the jury as crimes. In any event, this evidence would be admissible under well-established exceptions to the rule excluding "other crimes" evidence, since it showed a common scheme, plan or design involving incidents so related to each other that proof of one tended to prove the other.

ARGUMENT

I. THE PENNSYLVANIA SUPERIOR COURT PROPERLY AFFIRMED THE TRIAL COURT'S DENIAL OF PETITIONER'S MOTION TO SUPPRESS EVIDENCE BASED ON AVERMENTS IN THE AFFIDAVIT OF PROBABLE CAUSE USED TO OBTAIN THE SEARCH WARRANT.

Petitioner, Russell C. Earhart, Sr., challenges the validity of the search warrant served upon his offices on October 7, 1983. Dauphin County Chief Detective Kenneth Barbush applied for the warrant, which was issued by the Honorable William W. Lipsitt of the Court of Common Pleas of Dauphin County, Pennsylvania.

Specifically, Petitioner claims that the warrant application was defective because suppression hearing testimony by the affiant, Detective Barbush, indicated "unawareness of sufficient factual evidence and reasonable inferences that could be drawn therefrom." The application for the warrant included a

four-page summary of an audit report by Main Hurdman, employed by Dauphin County to investigate county real estate tax collections by Petitioner. Detective Barbush was cross-examined at the suppression hearing concerning a number of details contained in the audit of which he did not have firsthand knowledge. He stated, however, that he did swear to the truth of those averments. It is not fatal that the averments set forth in an application for a search warrant are founded upon hearsay, McGray v. Illinois, 386 U.S. 300, 87 S.Ct. 1056 (1967); Commonwealth v. Dial, 445 Pa. 251, 285 A.2d 125 (1971), or even where probable cause is based on hearsay. Commonwealth v. Kaschik, 235 Pa. Super. 388, 344 A.2d 519 (1975).

While it is true that the veracity of facts establishing probable cause recited in an affidavit can be challenged and examined at a suppression hearing, Commonwealth v.

Hall, 451 Pa. 201, 302 A.2d 342 (1973), Petitioner does not and cannot contend that the affiant falsified the averments in this case. Since the averments in the affidavit are admittedly truthful, the task of the judge issuing the warrant was "simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 776 L.Ed.2d 527 (1983).

The auditor's conclusions contained in the report made part of the affidavit plainly show that Petitioner was holding tax collections for several months before turning them over to the county. This, of course,

was a violation of 72 P.S. §5519.30, and provided probable cause for a warrant to issue.

II. THE PENNSYLVANIA SUPERIOR COURT PROPERLY AFFIRMED THE TRIAL COURT'S EVIDENTIARY RULING ALLOWING EVIDENCE OF APPELLANT'S QUESTIONABLE TAX COLLECTION PRACTICES OTHER THAN THE OFFENSES CHARGED, UNDER WELL-ESTABLISHED EXCEPTIONS TO THE GENERAL EXCLUSION OF EVIDENCE OF OTHER CRIMES.

The Petitioner, Russell C. Earhart, Sr., argues that testimony and documentary evidence concerning real estate tax collections constituted evidence of other crimes not charged in the information and was improperly introduced.

By way of introduction and background, a certified public accountant from Main Hurdman testified that the Dauphin County Commissioners retained her firm initially to conduct an audit into county school district tax collections for Londonderry Township.

The accountant explained that it was not possible to do a complete audit of the tax collector's accounts unless real estate taxes were examined as well. It was only after the school district phase of the audit was undertaken that the missing monies, which formed the basis for the criminal charges, were discovered unremitted. The criminal charges were based upon unremitted school district taxes.

Although there was testimony that Petitioner collected approximately $71,000.00 in county real estate taxes in February and March, which were not remitted to the county until September, there is no testimony in the record from any source which suggested to the jury that the late remittance of real estate taxes was an illegal act.[1] It is true that

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[1] Failure to pay over taxes at the time and place required by the "Local Tax Collection Law", 72 P.S. §5511.25, does constitute a crime. See, 72 P.S. §5511.39.

there was evidence of the tax collector's responsibility to remit county taxes by the 10th of the month following collection and school taxes within three (3) days of collection. However, the possibility of criminal sanctions for failure to make timely remittance was never presented to the jury.

Even if the jury did somehow infer criminal conduct, such evidence was nevertheless admissible under well-recognized exceptions to the rule which generally excludes evidence of "other crimes". Where, for example, such evidence forms part of a chain, a sequence of acts, or becomes part of the history of the event on trial, or was part of the natural development of the facts, it is admissible. Commonwealth v. Brown, 462 Pa. 578, 342 A.2d 84 (1975).

Evidence of another crime is also admissible when it tends to prove "(1) motive; (2) intent; (3) absence of mistake or

accident; (4) a common scheme, plan, or design involving incidents so related to each other that proof of one tends to prove the others; (5) to establish the identity of the person charged with the commission of the crime on trial; or, (6) where the crime was committed to conceal the commission of the crime on trial or to escape its consequences." Commonwealth v. Terrell, 234 Pa. Super. 325, 339 A.2d 112 (1975). Just as the auditor found it necessary to look at the total picture of tax collections, it was necessary for the Commonwealth to introduce evidence concerning county tax collections to show what was happening with respect to the school district taxes, which formed the basis of the criminal charge. The situation with the county taxes established, at least inferentially, an "absence of mistake or accident". This evidence pointedly showed a "common scheme, plan, or design involving

incidents so related to each other" that proof of one tended to prove the other. Moreover, the late payment of county real estate taxes became the modus operandi "to conceal the commission of the crime on trial or escape its consequences." In sum, even if the jury was told directly that the untimely remittance of county taxes was a crime, such other criminal conduct was admissible for any one of the reasons set forth.

The testimony concerning late remittance of county taxes was also relevant as circumstantial evidence to show not only the theft of school district taxes, but also to show the mechanism by which the theft was accomplished. The evidence was deceptively simple on one hand and yet presented an enigmatic labyrinth of numbers on the other. The Commonwealth and defense stipulated that the missing tax payments alleged in the information had indeed been paid by the

individual taxpayers and received by Petitioner. Clifford Brown, who maintained the records of the tax receipts for the school district, testified that the tax bills specified in the information were not paid over by Petitioner.

At first blush, such evidence alone would seem sufficient to prove the Commonwealth's case. On the other hand, the Petitioner's evidence, largely uncontested by the Commonwealth, showed that all of the tax receipts represented by the 435 counts on the information were deposited into Petitioner's tax collector's account. By the same token, all of the monies deposited into this account were dispersed to various taxing authorities.

That which was at first perspicuous suddenly becomes ambiguous. If all of the taxes charged in the information were paid to and received by the Petitioner, deposited to his tax collector's account, and thereafter

disbursed to taxing authorities, where then is the theft? The answer to the apparent riddle is simply that the tax monies Petitioner received for the accounts charged in the information were used to pay tax bills due in an earlier period. The latter were incapable of identification since Petitioner had no records correlating his receipts and disbursements.

In sum, in order to prove the Commonwealth's theory that Petitioner was using after-received taxes to pay previously due taxes, it became necessary to show the jury the total picture with regard to county real estate and school district tax collections.

To this end, the jury heard testimony on the staggered time frames of county and school district tax collections. The jury was shown that not only did school district tax billings always follow county tax

billings by six months, but, of equal importance, taxpayers were given four or five time frames extending for almost a year within which to pay each of the taxes.

The net result of the tax collection system is that the tax collector is not called to account for county real estate tax collections (billed February 1st) until December 15. School district taxes (billed July 1st) are not reconciled by the tax collector until April 15 of the following year. Of course, by April 15, county real estate taxes have again been billed, and, the testimony showed, the majority were paid during the discount period of February and March. Even more lead time exists in the case of county real estate taxes where, although billed February 1, there are five and one-half months (July 1st through December 15th) of school district tax collections which overlap the county tax collection cycle.

The factual significance of this evidence is that it clearly demonstrates the opportunity for any tax collector to avail himself of either county or school district tax collections converting (or, more gratuitously, "borrowing") them for his own use while using subsequent collections from the other to cover the funds siphoned off.

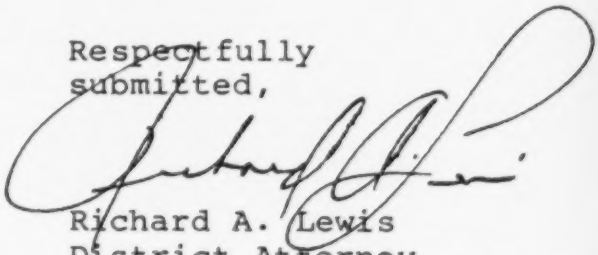
Having thus established the possibility of such conduct, it was incumbent upon the Commonwealth to show that Petitioner was in fact resorting to such machinations to accomplish the theft charged in this case. The evidence showed that, absent an audit, neither the county nor school district taxing authorities had any way to determine - other than through the tax collector's representations - when the monies covering a certain tax bill were actually received by the tax collector.

The evidence as to the dates of receipt of county real estate taxes and of the dates on which such taxes were paid over to the county fully developed the Commonwealth's theory that Petitioner not only had the opportunity to siphon off tax revenues while using after-received taxes to cover their short fall, but also that that was exactly what he was doing. Accordingly, just as the Main Hurdman audit was unable to accomplish its objective without looking at the total tax collection picture of county and school district taxes, the Commonwealth was justified in presenting the entire scope of the audit to the jury so that they could understand the mechanism by which the theft was accomplished.

CONCLUSION

Since neither Petitioner's Fourth nor Sixth Amendment rights were violated, Respondent respectfully asks this Honorable Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,



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